SUPREME COURT, U. S.
JAN 21 1974

In The

Supreme Court of the United States

October Term, 1973

No. 73-1127

ALBERT VICTORY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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The petitioner, Albert Victory, prays that a Writ of Certiorari issue to review the judgment of the New York Court of Appeals entered on October 23, 1973.

Opinion Below

The opinion of the Court of Appeals is not yet reported, but is reprinted in Appendix A to this petition. The Appellate Division wrote no opinion, but the Order of Affirmance is reprinted here as Appendix B.

Jurisdiction

Following a jury trial, on April 17, 1970 the petitioner was found guilty of felony murder in the State Supreme Court, New York County, in violation of New York Penal Law §125.25(3). On May 26, 1970 the petitioner was sentenced to a term of twenty-five years to life imprisonment. Petitioner's conviction was affirmed without opinion by the Appellate Division, First Department, on May 23, 1972 and by the Court of Appeals on October 23, 1973.

This petition is seasonably filed within 90 days of the Court of Appeals order. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Whether the affirmative defense provision of the New York Penal Law, §125.25(3), on its face and as applied in this case, violates petitioner's rights under the due process clause and the fifth amendment.

2. Whether the curtailment of defense counsel's use of two prior inconsistent statements violated due process of law and crippled the petitioner's right to confront his accusers.

3. Whether the petitioner was denied due process of law when he was forced into a joint trial with Robert Bornholdt, the only person who could exonerate him.

4. Whether the petitioner was denied a fair trial before an impartial panel.

Constitutional Provisions Involved

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statutes Involved

Penal Law, §125.25 Murder

"A person is guilty of murder when:

* * *

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person

other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Murder is a class A felony."

Penal Law, §120.05 Assault in the Second Degree

"A person is guilty of assault in the second degree when:

* * *

3. With intent to prevent a peace officer or a fireman from performing a lawful duty, he causes physical injury to such peace officer or fireman; or * * *"

Penal Law, §205.10 Escape in the Second Degree

"A person is guilty of escape in the second degree when:

1. He escapes from a detention facility; or

2. Having been arrested for, charged with or convicted of a felony, he escapes from custody.

Escape in the second degree is a class E felony."

Statement of Facts

On October 6, 1968 a New York police officer stopped petitioner outside Arthur's Discotheque for driving through a red light (684, 836, 1034, 1224).[1] Although witnesses to the events that followed gave varying descriptions of what happened between petitioner and the patrolman, John Varecha, one witness said Varecha pulled petitioner to the sidewalk from Arthur's stairs (1467-1468). Varecha then walked toward petitioner's car, threatening to have it towed away (1036).[2] Petitioner, following Varecha, begged the officer to "give me a break" (1037).

Some pushing and shoving occurred as they moved along the sidewalk (1038). The other defendant, Robert Bornholdt, who was a passenger in petitioner's car, followed petitioner and Varecha along the sidewalk (1041). Petitioner told Bornholdt to stay out of the matter saying, "I'll take care of this" (1042, 1232, 1337).

The People's chief witness, Francisco Garcia, a bystander, testified under questionable circumstances that petitioner kneed Varecha in the groin (1042). Bornholdt, "pouncing" on Varecha, was smashed on the head by the officer's billy club (1046, 1297). Petitioner was clubbed several times and pushed onto a parked automobile (964, 1047). Petitioner bled profusely after being clubbed (1049, 1051, 1235).

Varecha, holding his groin, drew his revolver with his other hand, arrested petitioner and Bornholdt, and told them to stand against an alley wall (1052). Petitioner holding his head complied (1052, 1237).

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[1]Refers to pages of the printed Record on Appeal in the New York Court of Appeals.

[2]Petitioner had initially denied ownership of the car.

"Get a cop; get a cop. This guy is crazy."

Petitioner, calling for assistance, said to Garcia, "Get a cop; get a cop. This guy [Varecha] is crazy" (1195, 1242, 1244). Bornholdt continuously moved behind Varecha. Petitioner continued to plead with Varecha to " . . . give me a break, I wasn't doing anything" (1052).

Varecha then ordered petitioner to move over to the other side of the alley, and he obeyed (1241). Petitioner stood next to the wall, with his hands raised, but Bornholdt continued to move behind Varecha. Garcia saw Bornholdt "grabbing" for something in his clothing (1058, 1249-1250).

Bornholdt's Shooting of Varecha

Garcia went out to the sidewalk and yelled to his wife to "get help" (1058). He heard a shot and fell to the ground (1059, 1252). Garcia immediately got up and began to run toward Arthur's. Hearing a second "soft" shot, he returned to the alley (1254). Just as he approached the alley, he heard a series of rapid-fire shots. Garcia saw the flash from the last shot fired by Bornholdt, who was standing over Varecha gun in hand (1060-1061).

After Bornholdt bolted out of the alley, petitioner crept out slowly, with his back and hands against the wall (1527, 1585). Petitioner ran down the street, but was stopped by an off-duty police officer (1529). Bornholdt was captured by an off-duty Housing Authority police officer (1662). When returned to the alley, petitioner repeatedly protested his innocence, saying, "Didn't I tell you to call the cops. What did I do? I didn't do nothing" (879, 1065, 1350, 1483, 1485).

Petitioner and Bornholdt were then indicted and tried for felony murder. Bornholdt was also charged with common law murder for his shooting of Varecha. The prosecution's theory was that petitioner and Bornholdt were arrested after feloniously assaulting Varecha, causing serious physical injury,

and then attempted to escape from custody. During the alleged attempt to escape, Bornholdt shot Varecha.

The jury deliberated for two days and finally found petitioner guilty of felony murder. In light of the life sentence imposed upon petitioner for this abortive felony murder conviction, we turn immediately to the substantial reasons why the writ should be granted.

REASONS FOR GRANTING THE WRIT

POINT I

The affirmative defense provision of New York Penal Law, §125.25(3), on its face and as applied in this case, violates petitioner's rights under the due process clause and the fifth amendment.

The affirmative defense included in §125.25(3), requiring that a defendant prove he did not aid in the commission of another's homicide and that he had no reasonable grounds to believe another intended a homicide, is incompatible with an accused's constitutional privilege against self-incrimination.[3] The magnitude of this issue must be measured against the historic protection always afforded a man's privilege to remain silent.

In an unbroken series of cases extending over a long stretch of this Court's history it has been held postulate that in a criminal prosecution the defendant is entitled to the protection of the presumption of innocence, and his guilt must be established

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[3]Section 125.25(3) provides in relevant part that a defendant must prove that he:

> (a) did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
>
> (b) was not armed with a deadly weapon, . . . ; and
>
> (c) had no reasonable ground to believe that any other participant was armed with such a weapon, . . . ; and
>
> (d) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Defense counsel, completely prevented from discussing the affirmative defense in his summation (2847), excepted to the court's charge on the affirmative defense.

beyond all reasonable doubt.[4] And of course, no unfavorable inference can be drawn from defendant's failure to offer evidence on his own behalf. *Griffin* v. *California*, 380 U.S. 609 (1965). Moreover, New York courts have consistently held that the People must prove the non-shooting defendant acted in concert with the shooting defendant in a felony murder prosecution.

The burden of proof must always remain with the prosecution in respect to each and every element of the crime charged. *Leary* v. *United States*, 395 U.S. 6 (1969); *Leland* v. *Oregon*, 343 U.S. 790 (1952); *Lilienthal's Tobacco* v. *United States*, 97 U.S. 237 (1878). The *Leary* case is fully relevant here because the removal of the People's obligation to prove that petitioner acted in concert had the effect of presuming his guilt on that critical issue. For that matter, requiring the defendant to disprove this element of the offense is far more grievous than the creation of a statutory presumption. In the latter case, once the presumption is rebutted, the prosecution must go forward and establish that fact beyond a reasonable doubt. Whereas here, that critical burden of proof never returns to the People. The defendant must disprove that significant criminal element by a preponderance of the evidence.[5] No such rule pertains in the statutory presumption case.

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[4] *In re Winship*, 397 U.S. 358 (1970); *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958); *Holland* v. *United States*, 348 U.S. 121, 138 (1954); *Leland* v. *Oregon*, 343 U.S. 790, 795 (1952); *Brinegar* v. *United States*, 338 U.S. 160, 174 (1949); *Michaelson* v. *United States*, 266 U.S. 42 (1924); *Wilson* v. *United States*, 232 U.S. 563, 569-570 (1914); *Holt* v. *United States*, 218 U.S. 245, 253 (1910); *Davis* v. *United States*, 160 U.S. 469, 488 (1895); *Coffin* v. *United States*, 156 U.S. 432 (1895); *Miles* v. *United States*, 103 U.S. 304, 312 (1880).

[5] Here, the trial court's charge ensured petitioner's heavy burden:

"Now when the law imposes the obligation of establishing an affirmative defense on a defendant he is required to establish it by a preponderance of

(*Footnote continued on following page.*)

Even in the case where the defendant must raise the defense of insanity, the prosecution must disprove it beyond a reasonable doubt. *Davis* v. *United States*, 160 U.S. 469 (1895). The relocation of the burden of proof on these essential elements of the crime of felony murder is constitutionally impermissible.

By allocating to the defendant the burden of proof on the crucial issues involved in this affirmative defense, the jurors come to expect proof from the accused. Here the petitioner was unable to call his co-defendant, the only person who could exculpate him, and was forced either to take the stand or remain silent and suffer the consequences. Furthermore, these statutory provisions detract from the court's charge on the defendant's privilege to remain silent and penalize a defendant for invoking that constitutional privilege. *See United States* v. *Jackson*, 390 U.S. 570 (1968).

There may be some areas of proof assigned to a defendant in a criminal trial. For affirmative defenses usually are based upon the defendant's exclusive knowledge of certain facts. However, an affirmative defense may not be enlarged to include the main elements of a particular crime. They should be limited to persons excused from criminal liability because of special circumstances. In that situation a defendant need only prove his membership in the class of persons protected by the affirmative defense. Consequently, requiring a defendant to prove his membership in such a protected class is not unreasonable for the

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(*Footnote continued from preceding page.*)

> evidence. He is not required to establish his affirmative defense beyond a reasonable doubt, but only by a preponderance of evidence." (3058)

The court then told the jury that if the evidence were balanced:

> ". . . so evenly that you are unable to say whether there is a preponderance of evidence on either side, then you must resolve the question in favor of the prosecution, and find that the defendant has failed in his burden of establishing his affirmative defense by a fair preponderance of evidence." (3060)

prosecution is still obliged to prove all essential elements of the crime.[6]

Finally, under this case's unique circumstances the error was compounded when the affirmative defense was unconstitutionally applied. Here the Court of Appeals expressly recognized that the elements of the affirmative defense in the New York statute go, "in the final analysis, to the guilt — to the rightness of punishing the accused. It recognizes, in effect, the unjustness of imposing criminal liability for consequences as to which there is no culpable mental disposition on the part of the accomplice defendant." (A-8, *infra.*) The Court concluded: "That being the case, and considering the disparities and convenience of proof and opportunity for knowledge, it seems appropriate to shift the burden of persuasion to the defendant." (A-9, *infra.*)[7]

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[6] As an example, the affirmative defense in New York Penal Law, §235.15 states:

> "In any prosecution for obscenity, it is an affirmative defense that the person to whom allegedly obscene material is disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justifications for possessing or viewing the same."

Thus, persons who belong to scientific, educational, governmental, or other similar classes, and who normally would be charged with promoting obscenity, may avoid the strictures of the penal statute simply by demonstrating their membership in one of the insulated classes.

Other illustrative affirmative defenses may be found in the following New York Penal Law sections:

> Unlawful imprisonment, §135.15, and Kidnapping, §135.30 (defendant may show he is a relative).
>
> Arson, §150.05 (defendant may show he is the sole proprietor of the building).
>
> Falsifying business records, §175.15, and Issuing a bad check, §190.15 (defendant may show he is an employee acting pursuant to his employer's direction).
>
> Endangering welfare of a child, §260.15 (defendant may show he is a parent or guardian and a member of a certain religious organization).

[7] The test of "convenience" is worth examining in this case. For purposes of studying the fairness of shifting the burden of proof, assume these hypothetical facts, which are in no way contradicted by the trial testimony:

(*Footnote continued on following page.*)

Under circumstances such as those in our hypothetical, where is the disparity and convenience of proving petitioner's lack of knowledge that Bornholdt was armed and intended to shoot the police officer? And how can petitioner possibly sustain the burden of proof imposed by the New York statute? There was no evidence whatever that petitioner and Bornholdt had earlier set out together with a planned felony in mind. They were not robbers, burglars, rapists, or escapees from an institution. There was no planned felony in progress which would suggest that petitioner had a way of knowing that Bornholdt was armed and would shoot a police officer. In short, petitioner was clearly denied due process of law when, on the facts here, the criminal process simultaneously compelled him to come forward with the very proof that was otherwise denied to him by the state. For all these reasons, this Court should grant a writ of certiorari.

(*Footnote continued from preceding page.*)

Petitioner attends a party with a friend. At the party he meets for the first time a man named Bornholdt who is there with his friend. They engage in some casual, insignificant conversation. Later, petitioner mentions that he is going to Arthur's Discotheque. This man Bornholdt asks for a ride and petitioner obliges. En route to Arthur's, petitioner commits certain traffic infractions for which he is stopped by a police officer. Petitioner attempts to talk his way out of the traffic summons and, noticing Bornholdt's pique, directs him to stay out of the matter on more than one occasion.

A scuffle ensues. Petitioner and Bornholdt are both arrested at gun point, but Bornholdt refuses to surrender. Instead, Bornholdt suddenly draws an 8-shot semi-automatic pistol and fatally shoots the police officer. Petitioner and Bornholdt are both arrested and tried for felony murder. Despite Bornholdt's statement exonerating him, petitioner is denied a separate trial and cannot call Bornholdt as a witness in a joint trial.

POINT II

The curtailment of defense counsel's use of two prior inconsistent statements violated due process of law and crippled the petitioner's right to confront his accusers.

Another critical issue, involving a violation of the petitioner's rights under the due process and confrontation clauses, is the curtailment of defense counsel's cross-examination of the People's principal witness. On the night of the shooting, Francisco Garcia gave two statements regarding the events he had witnessed.[8] In neither statement did Garcia mention the alleged kneeing of officer Varecha by the petitioner. That kneeing incident was the cornerstone of the whole case which, in its absence, would have come crashing down. Without the kneeing there was no assault, no lawful arrest, no possible escape from custody, and no felony murder. It is that simple. And it is uncontroverted that both statements contained this glaring omission.

Until the Court of Appeals decision here, the law regarding use of prior inconsistent statements for impeachment of witnesses was the same in the federal and New York courts. Thus, in *People* v. *Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), the Court of Appeals implemented this Court's holding in *Jencks* v. *United States*, 353 U.S. 657 (1957). However, the Court of Appeals, apparently straining here to uphold the conviction of a "cop killer," fashioned a new rule which clashes both with fundamental fairness and with the facts of this case. The Court of Appeals held that the omission from not one but two statements given within a few hours of the events of a "fact related at trial" could not be shown to the jury unless defense

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[8]One statement was taken by Detective Byrne and the other, a twelve-page stenographically recorded statement, was taken by an Assistant District Attorney.

counsel first demonstrated that the witness' attention had been directed toward that particular detail at the time he gave the statement. (A-12, *infra*.)

Incredible as it may seem, the Court of Appeals developed this new rule despite the fact that Garcia testified that he thought he had told the detective and prosecutor about the kneeing incident (1188). That testimony can only mean that if the kneeing incident actually happened,[9] Garcia's attention was in fact directed toward that detail at the time of the statements. Therefore, there is no factual basis in this case for the Court of Appeals' application of such a rule. Due process thus requires review by this Court of this improper conviction.[10]

Equally significant is the injustice wrought by this new rule. For the ultimate function of the jury trial was poorly served when the jury heard Garcia recall telling the detective and prosecutor about the kneeing, but were not informed that if he told them, it appeared nowhere in his statements. The better procedure in a case of this sort would be to permit defense counsel to demonstrate the omission and allow the prosecution to show whether the witness' attention had been directed to that fact. The jury could then decide more capably whether the omission was based upon the witness' lack of candor or upon an oversight.

The defendant's unfettered right to cross-examine his accusers is basic to our system of criminal justice. *Douglas* v.

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[9]The medical examiner found no sign of trauma or injury to Varecha's genitals, and there were no bruises on his thighs (1864-1865, 1905).

[10]The cases cited by the Court of Appeals at A-12 were furnished by the District Attorney in an eleventh hour patchwork of a critical point in the appeal. This pitiful attempt to justify the trial court's ruling was made by the People for the first time in the Court of Appeals. Those decisions, however, either predate *Rosario* and *Jencks*, or are civil cases involving none of the constitutional concerns inherent in this criminal proceeding. Moreover, in *State* v. *Romprey*, 339 S.W.2d 746 (Mo. 1966), the court approved the very procedures sought below by defense counsel.

Alabama, 380 U.S. 415 (1965); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *Tha-Soo-yel-lee* v. *United States*, 167 U.S. 274 (1897). And in *California* v. *Green*, 399 U.S. 149 (1970), this Court approved the receipt in evidence of a prior inconsistent statement. Therefore, there exists no compelling reason for subverting the constitutional right of confrontation and cross-examination by substituting a rule which clearly deals with a question of fact which, in the final analysis, should be determined by the jury.

The denial of fundamental fairness in restricting defense counsel's use of these vulnerable and inconsistent prior statements requires the granting of a writ of certiorari.

POINT III

Petitioner was denied due process of law when he was forced into a joint trial with Robert Bornholdt, the only person who could exonerate him.

Another question of constitutional dimension which has infected the judgment below involves the trial court's denial of petitioner's motion for a severance.

Pitted against the impossibility of proving his affirmative defense and unable to call as a witness a co-defendant who had confessed his exclusive guilt, petitioner repeatedly moved for a separate trial (23-24, 82 1952-1958).[11] The denial of this severance motion violated petitioner's right to call witnesses on his own behalf guaranteed under the sixth amendment, and denied him due process of law under the fourteenth amendment. Certiorari should, therefore, be granted.

At trial, defense counsel explained that Bornholdt had stated to another attorney at the Bellevue Hospital that petitioner had

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[11]The motion papers are reproduced in the record at pages: 126A-129A, 137A-139A, 141A-145A.

nothing to do with shooting the officer (26-28).[12] The statement read:

> "Albert Victory had nothing to do with the shooting of the police officer on October 7, 1968 outside the club Arthur. I alone did the shooting because the police officer had clubed [*sic*] me on the head and had pointed and fired his gun at me and Albert. Both Albert and I would have been killed by this police officer who had gone crazy and clubed [*sic*] me and Albert and he was going to shoot us." (130A)

Bornholdt never denied making the statement or its truth, and consistently claimed Victory was innocent. He would have so testified in a separate trial (130A, 1957, 3511).

Bornholdt's attorney indicated that his client would invoke his fifth amendment privilege, and the court ordered petitioner's counsel not to call Bornholdt as a witness (48). However, Bornholdt could have exonerated Victory in a separate trial, for at sentencing he stated:

> "I would like to say Albert Victory never knew I had the gun with me and I was insane at the time." (3511)

The denial of Victory's severance motion, despite his desperate need for Bornholdt's testimony, imposed on Victory a sanction so Draconian as to be constitutionally intolerable. It is shocking that in this modern day an innocent man can be forced to stand trial for his life, unable to call the one person who can establish his innocence.

Only last term, this Court considered the fate of a defendant similarly unable to summon evidence that would demonstrate his innocence. *Chambers* v. *Mississippi*, U.S. , 93 S.Ct.

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[12]The severance motion here was made three weeks before trial because prior to that it appeared that Bornholdt would be unable to proceed to trial (22). As petitioner's lawyer argued, the psychiatric report from the hospital indicating Bornholdt's ability to stand trial was issued only 24 hours before the return date of the severance motion (43).

1038 (February 21, 1973).[13] State evidentiary rules compelled the exclusion of the exculpatory evidence in *Chambers*, while here it was the discretion of the trial court. This serious injustice compelled the Court to write in *Chambers:*

> "But . . . [the] denial or significant diminution [of the right of confrontation and cross-examination] calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined. *Berger* v. *California*, 393 U.S. 314, 135 (1969).
>
> * * *
>
> "We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process." (93 S.Ct. at 1046, 1049)[14]

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[13] In *Chambers* this Court held under the due process clause that exclusion of certain defense evidence was constitutionally intolerable. There the petitioner was prevented from proving to the jury that he had not killed a police officer. A witness named McDonald had previously confessed to the shooting, but subsequently repudiated his confession. Chambers, because of state evidentiary rules, was precluded from adversely cross-examining McDonald about his previous admissions. He was further prevented on hearsay grounds from introducing the testimony of three witnesses to whom McDonald had confessed his guilt.

Here two witnesses testified that petitioner told Bornholdt to stay out of his discussions with Varecha (1042, 1232, 1337). Moreover, part of Garcia's statement to Detective Byrne suggested that Bornholdt had initiated an assault on the officer (1297), and petitioner, who was unarmed, did not shoot Varecha. Finally, Bornholdt's statements, which the jury never heard, showed that shooting Varecha was solely his idea. Thus, the similarity between our case and *Chambers* is remarkable because petitioner knew of other, persuasive evidence which unquestionably would have changed the jury's verdict, but was unable to present it to them. Indeed, our case is even more compelling than *Chambers*, for here the co-defendant's exculpatory statements were never repudiated.

[14] *See United States* v. *Shuford*, 454 F.2d 772 (4th Cir. 1971); *Byrd* v. *Wainwright*, 428 F.2d 1017 (5th Cir. 1970); *United States* v. *Echeles*, 352 F.2d 892 (7th Cir. 1965); *United States* v. *Gleason*, 259 F.Supp. 282 (S.D.N.Y. 1966); *People* v. *Owens*, 22 N.Y.2d 93, 291 N.Y.S.2d 313 (1968).

In the state court, in a separate trial, Bornholdt's statement would be admissible even if he invoked his privilege against self-incrimination. *People* v. *Brown*, 26 N.Y.2d 88, 94, 308 N.Y.S.2d 825, 829 (1970).

The Court of Appeals held here that the trial court did not abuse its discretion in denying petitioner's severance motion because petitioner did not prove: (1) what Bornholdt's testimony would be; (2) "how the purported statement would aid his defense to the felony murder charge;" (3) or that Bornholdt would in fact testify (A-11.)

Clearly Bornholdt would have testified that he alone did the shooting and that petitioner, who did not know Bornholdt was armed, did nothing to aid Bornholdt in the slaying of the officer. That testimony would have sustained petitioner's burden of proving the affirmative defense. Petitioner left no doubt of his intention to call Bornholdt in a separate trial and of what Bornholdt's testimony would be.

Our courts simply cannot continue to turn their backs on these claims made by defendants in good faith. Basic due process must transcend the small economy of jointly trying two defendants. Here, against the weight of petitioners large constitutional argument for a separate trial, the state leans only the minimal cost of trying Bornholdt in a separate proceeding, a precious small argument to assert against a man's liberty. For all these reasons, a writ of certiorari should be granted.

POINT IV

The petitioner was denied a fair trial before an impartial panel.

During the jury's selection process there occurred a violation of this Court's decision in *Witherspoon* v. *State of Illinois*, 391 U.S. 510 (1968). *See Maxwell* v. *Bishop*, 398 U.S. 262 (1970), and *Boulden* v. *Holman*, 394 U.S. 478 (1969). In *Witherspoon* the Court held that the state could not organize a "death-qualified" jury; that is, a jury composed exclusively of jurors who favored the death penalty for murder convictions. The Court, discussing the real possibility that such a jury would be comprised of prosecution-oriented jurors ready to convict the

defendant, found that such a jury did not represent a true cross-section of the community. The Court distinguished between persons who could not, under any circumstances, impose the death penalty, and those who opposed the death penalty but who would follow the trial court's instructions.

Here the *voir dire* resulted in a "death-qualified" trial jury, with all the prejudicial ramifications inherent in such a panel. Throughout the *voir dire* those veniremen who expressed reluctance regarding the death penalty were artfully examined by the court and the prosecutor at the Bench. Defense counsel sought unsuccessfully the right to examine the prospective jurors on this issue (34).[15] The opposition silenced, the prosecuting attorney carefully questioned each of the veniremen in this vein: " . . . the feelings that you have about capital punishment and against capital punishment, do you feel that they would make it impossible for you to vote the verdict of death in any case?" (35). When the venireman responded in the affirmative to this carefully worded question, the prosecutor challenged that venireman for cause. In every instance the challenge was sustained.

The prejudice inherent in obtaining a verdict from a jury thus organized cannot be fully ascertained and that very fact epitomizes the problem. One juror was dismissed even after she had sworn to render a fair and impartial verdict (16). Nonetheless, the prosecutor, putting words into the mouth of the prospective juror, was permitted to rehabilitate his challenge for cause.

On another occasion, where a prospective juror sought to explain himself, the court cut him short and, in dismissing him for his alleged inability to impose a death penalty, listened to the carefully chosen language of the prosecutor and not that of the prospective juror (35).

---

[15]We note that counsel was permitted to examine the veniremen with respect to other matters.

Defense counsel recorded his objection to the manner of the questioning of the veniremen, and alerted the court to the constitutional grounds for the objection, citing *Witherspoon* (287-288, 3510). The petitioner was convicted of murder, despite the failure of proof and all the other errors at the trial, by a "death-qualified" jury. Consequently, his conviction should be reviewed by this Court on a writ of certiorari.

Conclusion

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Court of Appeals Opinion

STATE OF NEW YORK
COURT OF APPEALS

---

1 No. 50 73

The People &c.,

Respondents,

vs.

Robert Bornholdt and Albert Victory,

Appellants.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

JASEN, J.:

At about 1:00 A.M. on October 7, 1968, a Cadillac operated by Albert Victory, with Robert Bornholdt as a passenger, sped through a red light on East 54th Street near Fifth Avenue in New York City. Patrolman John Varecha, a 25-year-old uniformed police officer on duty in the area, commandeered a taxicab and pursued the vehicle to Arthur's Discotheque on East 54th Street near Third Avenue. In the course of investigating the incident, an altercation ensued between Varecha, Victory and Bornholdt, during which Bornholdt shot Varecha four times at close range. He died enroute to Bellevue Hospital.

Indicted for intentional murder (Penal Law, § 125.25 [1]) (Bornholdt) and felony murder (Penal Law, § 125.25[3] [causing the death of a person during the commission of escape,

second degree]) (Bornholdt and Victory), defendants were convicted of the crimes charged after a joint trial before a jury. Bornholdt was sentenced to concurrent terms of imprisonment of 25 years to life, and Victory was sentenced to a term of 25 years to life. The Appellate Division unanimously affirmed and the appeals are before us by leave of an Associate Judge of this court. [1]

On Victory's appeal the principal issues are whether guilt was proven beyond a reasonable doubt, whether the affirmative defense in the felony murder statute is constitutional, whether the court properly denied a severance, and whether the court's rulings limiting the use of prior statements on cross-examination were proper.

On Bornholdt's appeal, the principle [*sic*] issues concern his competency at the time of trial, and at the time the crime was committed.

The testimony at trial established that Patrolman Varecha arrived at Arthur's Discotheque as the defendants were about to enter. He asked them who had been driving the Cadillac, which was parked at the curb, and demanded to see a registration and driver's license.[2] The defendants were evasive and uncooperative. They then started up the steps to the Discotheque, but Varecha blocked their entrance with his nightstick. The officer, holding Victory's arm to prevent him from entering the Discotheque, threatened to have the car towed away. Once again he asked who was driving and requested a registration and a driver's license. Victory grabbed Varecha by the lapels of his raincoat and stated, "Don't you touch me", or words to that effect. An altercation ensued, during which Victory kneed the

---

[1] Bornholdt also appeals so much of the order of the Appellate Division as affirmed the denial, without a hearing, of his motion for a new trial on the ground of newly discovered evidence.

[2] Victory's driver's license had been revoked three years earlier.

officer in the groin, doubling him over. Victory, now joined by Bornholdt, began punching and kicking the officer. Varecha fought back with his nightstick, striking the defendants about the head. Crouched over in pain, he drew his service revolver and told the defendants they were under arrest. Victory slowly backed up in a westerly direction toward Lexington Avenue, his arms outstretched, imploring the officer to give him a "break". Varecha told him to stop and get against a car in the street, but Victory kept backing up. Bornholdt was to the rear of the officer. Varecha again told the defendants that they were under arrest, and ordered them to get against an alley wall. A citizen came to the aid of the officer and was ordered out of the alley by the defendants. Victory, facing the alley wall with his hands extended, swung around and started fighting with the officer. Bornholdt jumped the officer from behind, drew a .32 caliber pistol, and in the course of the continuing altercation, discharged eight shots, four of which struck the officer, fatally wounding him. Bornholdt ran out of the alley, followed seconds later by Victory, who at first emerged slowly, his back to the westerly wall of the alley, arms extended. After a short chase, both defendants were apprehended by off-duty patrolmen who had been at the Discotheque.

PEOPLE v. *VICTORY*

Turning to defendant's first point, he contends that he was not proven guilty beyond a reasonable doubt. We conclude that there was ample evidence, if believed, to prove all the elements of felony murder.

There was eyewitness testimony from which the jury could reasonably find that Victory kneed the officer in the groin (Assault in the Second Degree, Penal Law, § 120.05[3])[3] and

---

3 "*§ 120.05 Assault in the second degree* [as amended L. 1968, c. 37]

A person is guilty of assault in the second degree when:

* * * *

3. With intent to prevent a peace officer or a fireman *** from performing a lawful duty, he causes physical injury to such peace officer or fireman.****"

that Bornholdt joined in the assault; that Varecha drew his service revolver and told the defendants that they were under arrest (Code Crim. Pro., § 177[1])[4]; that both defendants continued to resist the restraint sought to be imposed by the officer and got away (Escape in the Second Degree, Penal Law, § 205.10)[5], and that in the course of and in furtherance of getting away, Bornholdt shot and killed the officer, a criminal act, the responsibility for which, Victory, a participant in the underlying felony, must share. (Murder, Penal Law, § 125.25[3].)[6]

In a related point, Victory challenges the court's supplemental instruction concerning the felony murder charge. He refers to the court's supplemental instruction that "flight after a lawful arrest by a policeman for the felony of assault in the second degree does constitute the crime of escape in the second degree, whether the flight takes place before or after the shooting." The supplemental instruction was given in partial response to the following question asked by the jury foreman:

---

4 "*§ 177. In what cases allowed*

A peace officer may, without a warrant, arrest a person,

1. For an offense, committed or attempted in his presence * * * *"

---

5 "*§ 205.10 Escape in the second degree*

A person is guilty of escape in the second degree when:

1. He escapes from a detention facility; or

2. Having been arrested for, charged with or convicted of a felony, he escapes from custody.

Escape in the second degree is a class E felony."

---

6 "*§ 125.25 Murder*

A person is guilty of murder when:

* * * *

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants * * * *"

> "As a matter of law, does the fact of fight after the shooting itself establish escape in the second degree after an arrest has been made for felony assault?"

He argues that the court erroneously conveyed the impression that the jury could convict of felony murder even if it determined that the defendant's intent to escape arose after the shooting.

The governing principle is clear: a person may be convicted of felony murder only if it be proved that he or another participant in one of the enumerated felonies killed "in the attempted execution of the unlawful end." (*People* v. *Wood*, 8 N Y 2d 48, 51; see also *People* v. *Joyner*, 26 N Y 2d 106, 109; Penal Law, § 125.25[3].) The trial justice, obviously cognizant of this principle, repeatedly, both in the main charge and in the supplemental charge, instructed the jury that the shooting must have occurred "during the course of", "in furtherance of" and "while" committing the crime of escape. In sum, the court's charge sufficiently informed the jury that if the defendant did not intend to escape at the time the killing occurred, it could not convict of felony murder.

Defendant next raises a constitutional challenge to the affirmative defense provisions of the felony murder statute. Section 125.25 (subdivision 3) of the Penal Law provides that in a felony murder prosecution in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

> "(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
>
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
>
> (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

> (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

The burden of proof for affirmative defenses is specified in section 25.00 (subdivision 2):

> "When a defense declared by statute to be an 'affirmative defense' is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence."

That is to say, the defendant has the burden of going forward with the evidence on the issue as well as the burden of persuasion thereon, but merely by a fair preponderance of the evidence.

Defendant asserts that the statutory affirmative defense violates his constitutional privilege against self-incrimination. Specifically, he contends that the affirmative defense provision impels a defendant to take the witness stand and, in effect, requires him to disprove any connection with the killing. While couched in terms of the Fifth Amendment, defendant's argument is more in the nature of a constitutional due process challenge with Fifth Amendment overtones.

The revised Penal Law worked a significant change in prior law by providing an accomplice of a felon who kills an affirmative defense to a felony murder charge. Under the former Penal Law, none of the above enumerated elements constituted a defense to the crime of felony murder where the defendant had the requisite felonious involvement. (See, e.g., *People* v. *Michalow*, 229 N. Y. 325; *People* v. *Friedman*, 205 N. Y. 161; see also, Comment, *Affirmative Defenses Under New York's New Penal Law*, 19 Syracuse Law Rev. 44) The harshness of the rule in particular cases was apparent, and, hence, the instant provisions were incorporated in the revised Penal Law affording an accomplice of a felon who kills an opportunity to "fight his way out" of a felony murder charge.

The affirmative defense provisions, generally, of the Penal Law altered the common law concept of how such defenses were to be established. Traditionally, the defendant asserting a conventional affirmative defense had the burden of going forward with some evidence making the defense one of the issues in the case. (*People* v. *Utica Daw's Drug Co.*, 16 A D 2d 12, 18; see also, *People* v. *Egnor*, 175 N. Y. 419; *People* v. *Downs*, 123 N. Y. 558.) The burden of persuasion, however, remained upon the People upon the whole case to negative the defense beyond a reasonable doubt. (*People* v. *Sandgren*, 302 N. Y. 331, 334; *People* v. *Utica Daw's Drug Co.*, *supra.*)

We recently had occasion to pass on the constitutionality of the affirmative defense of entrapment (Penal Law, §§ 40.05, 25.00[2]) and upheld it against a due process challenge. (*People* v. *Laietta*, 30 N Y 2d 68.) We conclude that the affirmative defense provisions of the felony murder statute are also sustainable.

Due process imposes no impenetrable barrier to shifting the burden of persuasion to the defendant in a criminal case. Within the bounds of reason and fairness, a defendant may be expected to carry the burden of proving his defensive claim (e.g., *Leland* v. *Oregon*, 343 U. S. 790, 799.) However, no single principle can be articulated to explain when these shifts of burden are constitutionally defensible (for attempts at articulation of a principle, see *Rossi* v. *United States*, 289 U. S. 89, 91-92; *United States* v. *Fleischman*, 339 U. S. 349, 360-363.) Rather, what is involved is a subtle balance which acknowledges first that the prosecution adduce sufficient evidence to support the accusation. Beyond this, a point is perceived where it becomes fair to call upon the defendant to prove his claim of defense, as where there is a "manifest disparity in convenience of proof and opportunity for knowledge." (*Morrison* v. *California*, 291 U. S. 82, 91; see also, *People* v. *Laietta*, *supra*, at p. 75.)

The components of the statutory defense before us are peculiarly within the knowledge of the defendant, and are matters upon which he may be fairly required to adduce supporting evidence. For example, who better than the non-killer defendant knows whether his confederates were armed or intended to engage in conduct dangerous to life, and can adduce evidence thereon. To require the prosecution to disprove these elements beyond reasonable doubt would unduly enlarge the scope of the prosecution's proof and reduce whatever efficacy the felony murder statute has. On the other hand, casting upon the defendant the burden of persuasion by a preponderance of the evidence imposes no undue hardship or oppression. The fact that some pressure may thereby be exerted on the defendant to testify would not itself seem to establish unfairness. (See *Yee Hem* v. *United States*, 268 U. S. 178, 185.)

Unlike the defense of entrapment, which merely interposes a bar to prosecution, a defendant's claim for exoneration under the statutory defense before us goes, in the final analysis, to the guilt — to the rightness of punishing the accused. It recognizes, in effect, the unjustness of imposing criminal liability for consequences as to which there is no culpable mental disposition on the part of the accomplice defendant. (See, B. Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N. Y. Law Forum 565, 590; see also, A.L.I. Model Penal Code, Tent. Draft No. 9 [1959], § 201.2, subd. [1], par. [b], Comments at pp. 33-39.) As such, it introduces a heretofore unknown mitigation into the harsh common law doctrine of felony murder. By the same token, the statutory defense is inconsistent with the rationale of the doctrine itself which ascribes malice to the felon who kills in the perpetation of an inherently dangerous felony and holds an accomplice in the underlying act vicariously responsible under common law principles of accessorial and conspiratorial liability. While the basic premises underlying the felony murder doctrine have been seriously questioned (see, e.g., A.L.I. Model Penal Code, Tent. Draft No. 9 [1959], § 201.2,

subd. [1], par. [b], Comments at pp. 33-39, *supra*), the Legislature, as is its wont, has chosen to retain the doctrine's basic underlying principle of constructive malice and accomplice liability. The exception or affirmative defense incorporated in the revised Penal Law was intended to be a narrow one. (R. Denzer and P. McQuillan, Practice Commentary, McKinney's Cons. Laws of N. Y., Book 39, p. 237, under Penal Law, § 125.25.) That being the case, and considering the disparities in convenience of proof and opportunity for knowledge, it seems appropriate to shift the burden of persuasion to the defendant. (Cf., A.L.I. Model Penal Code, Tent. Draft No. 4 [1955], 1.13, Comments at pp. 110-114, esp. at p. 113.)

Nor are the considerations fully applicable here which caused the Court in *Stump* v. *Bennett* (398 F 2d 111 [8th Cir.], cert. den. 393 U. S. 1001) to set aside, on due process grounds, the Iowa statute making alibi an affirmative defense. There the statute created insuperable evidentiary difficulties with respect to the burden of persuasion because the defense and the prosecution's proof turned on a principal issue and the evidence on that issue, namely, the defendant's presence at the time and place of the crime. The Court was of the view that by shifting the burden of proof to a person who claims to have been elsewhere when the crime was committed, an irrational and arbitrary presumption of guilt was created. (398 F 2d 116.) Here, no such difficulties of proof are presented. The prosecution need prove commission of the requisite underlying felony and, in the course thereof, that one of the participants caused the death of another person (other than one of the participants). The responsibility of all participants for the death caused in perpetrating the underlying crime is thereby established under the principles discussed above. The defendant's burden is entirely different. It is incumbent upon him, by way of mitigation, to demonstrate that his culpability is relatively minor and that he should not be held answerable to a felony murder charge. In this regard, it is his burden to persuade the jury that he had "nothing to do with

the killing itself * * * was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life." (R. Denzer and P. McQuillan, McKinney's Cons. Laws of N. Y., Book 39, p. 237, under Penal Law, § 125.25.)

Turning next to the severance issue, on balance, we do not believe the trial court abused its discretion in denying the motion. The relevant facts are these. In a motion returnable on the same date the case was moved for trial and jury selection commenced, Victory moved for a severance. The alleged ground was that he intended to call his co-defendant as a witness to introduce a statement, purportedly made by Bornholdt, exculpating Victory. The statement, which was unsigned, read:

> "Albert Victory had nothing to do with the shooting of the police officer on October 7, 1968 outside the club Arthur. I alone did the shooting because the police officer had clubed [sic] me on the head and had pointed and fired his gun at me and Albert. Both Albert and I would have been killed by this police officer who had gone crazy and had clubed [sic] me and Albert and he was going to shoot us."

The court denied the motion, noting *inter alia*, that the statement was purely conclusory, and that the motion was untimely.

The governing principles may be quickly set out. A motion for a separate trial is directed to the sound discretion of the trial court, subject to review only for an abuse thereof. (*People* v. *Owens*, 22 N Y 2d 93; see also, *Opper* v. *United States*, 348 U. S. 84, 95; *United States* v. *Echeles*, 352 F 2d 892 [7th Cir.].) Where proof against the defendants is supplied by the same evidence, only the most cogent reasons warrant a severance (*United States* v. *Kahn*, 381 F 2d 824, 839 [7th Cir.], cert. den. 389 U. S. 1015.) But upon a proper showing of need for a co-defendant's testimony, it may be an abuse of discretion to deny severance. (*People* v. *Owens*, *supra*, at p. 98; see, *United States*

v. *Gleason*, 259 F. Supp. 282 [S. D. N. Y.].) However, a proper showing of need imports that the movant clearly show what the co-defendant would testify to and that such testimony would tend to exculpate the movant. (*Byrd* v. *Wainwright*, 428 F 2d 1017, 1020 [5th Cir.].) Moreover, the Court is not required to sever where the possibility of the co-defendant's testifying is merely colorable or speculative. (*Byrd* v. *Wainwright*, *supra*, at p. 1022; *United States* v. *Kahn*, *supra*, at p. 841.) Finally, the motion must be timely. (*People* v. *Owens*, *supra*, at p. 98.)

Applying these guidelines to the instant case, it cannot be said that the court abused its discretion in denying the motion. Victory never offered proof as to what Bornholdt's testimony would be, save for the conclusory statement quoted above. Nor did he show how the purported statement would aid his defense to the felony murder charge.[7] Nor for that matter did he show that Bornholdt would in fact testify. Finally, the motion was untimely in that it was not made until the eve of trial although the facts on which it was based were known to defense counsel months earlier.

Defendant next contends that the court unduly restricted his cross-examination of a key witness respecting the use of prior statements made by the witness to the police and an Assistant District Attorney. Specifically, counsel sought to use the statements to impeach Francisco Garcia's trial testimony that the defendant, Victory, kneed Patrolman Varecha in the groin. In the two prior statements, Garcia omitted any reference to having seen Victory knee the officer.[8] The court refused

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[7] We note that the People did not have to connect Victory with the shooting, other than to prove that it occurred in the course of and in furtherance of the felony of escape in the second degree.

[8] The significance of this testimony is that Victory could not be found guilty of felony murder unless he had been arrested for a felony and then escaped or attempted to escape during the course of which the killing occurred. The kneeing incident (assault, second degree, Penal Law, § 120.05[3]) was the predicate for the felony arrest and all that followed.

counsel's request to introduce the full statements into evidence and sustained objections to certain questions designed to show that the statements contained no reference to the alleged kneeing.

While it is well established that a witness' prior inconsistent statements may be used to impeach his trial testimony (e.g., *People* v. *Friedman*, 205 N. Y. 161, 167-168, *supra*), the test of inconsistency, we have said, is not limited to outright contradictions between a witness' prior statements and his trial testimony; it includes, as well, omitting to mention critical facts at the prior time, which facts are later related at trial (*People* v. *Rosario*, 9 N Y 2d 286, 289-290, quoting *Jencks* v. *United States*, 353 U. S. 657, 667.) The weight of authority holds, however, that a witness may not be impeached simply by showing that he omitted to state a fact, or to state it more fully at a prior time. It need also be shown that at the prior time the witness' attention was called to the matter and that he was specifically asked about the facts embraced in the question propounded at trial. (E.G., *Brooks* v. *E. J. Willig Truck Transportation Co.*, 40 Cal 2d 669, 255 P 2d 802, 806; *People* v. *Scott*, 218 Cal App 2d 249, 32 Cal. Rptr. 225, 229; *State* v. *Romprey*, 339 S W 2d 746, 751-752 [Mo. Sup. Ct.]; *Tanksley* v. *United States*, 145 F 2d 58, 60 [9th Cir.]; *Louisville & N. R. Co.* v. *Mitchell's Administratrix*, 276 Ky. 67, 124 S W 2d 1025, 1027; *Lamb* v. *Woodry*, 154 Or. 30, 58 P 2d 1257, 1260; *Ball* v. *State*, 43 Ariz. 556, 33 P 2d 601, 602; cf., *Steen* v. *Burleson*, 268 App. Div. 815; see also, 3A Wigmore, Evidence, § 1042 [Chabourne rev. 1970]; Underhill, Criminal Evidence, § 240 [5th ed., 1956].) The rule, we would say, accords with human experience recognizing that unless asked directly about a matter a person may quite normally omit it from a narrative description.

Applying this principle to the case before us, defendant failed to show that at the prior time Garcia's attention was specifically called to the manner in which Victory allegedly inflicted the blows upon Officer Varecha. Failing this, his trial testimony

could not be impeached by showing he omitted to mention the kneeing incident in the prior recorded statements.

We have considered defendant's other arguments for reversal and find them to be without substance.

PEOPLE V. BORNHOLDT

Defendant Bornholdt contends that a tranquilizing drug administered to him at Bellevue Hospital while awaiting trial rendered him incompetent to participate meaningfully in the jury selection proceedings, denying him due process of law. The record indicates, however, that although the defendant may have experienced uncomfortable moments, he was mentally aware of the proceedings, and was able to participate and converse with his attorney every day that the jury was being selected. Moreover, on no occasion did counsel request a continuance or adjournment on those days when he claimed his client was uncomfortable or unresponsive.

We have also considered the contention that the People failed to prove beyond reasonable doubt his sanity at the time of the crime. But although the psychiatric experts of the defense and prosecution gave contradictory views as to whether Bornholdt was suffering from paranoid schizophrenia at the time of the shooting, there was more than sufficient evidence from which a jury was privileged to conclude that defendant knew and appreciated the consequences of his conduct, and that such conduct was wrong.

The other points raised by the defendant have also been considered and found to be without merit.

In each case, the order of the Appellate Division should be affirmed.

* * * * * * * *

Orders affirmed. Opinion by Jasen, J. All concur.

APPENDIX B

Order of Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 7, 1971.

Present — Hon. Emilio Nunez, *Justice Presiding*
Theodore R. Kupferman
James B. M. McNally
George Tilzer
Samuel W. Eager, *Justices*

The People of the State of New York,

Respondent,

against

Albert Victory,

Defendant-Appellant.

Order of Affirmance on Appeal from Judgment
4514

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Davidson, J.), rendered on May 26, 1970, convicting him of felony murder, and said appeal having been argued by Mr. Herald Price Fahringer of counsel for the appellant, and by Mr. Bennett L. Gershman of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

HYMAN W. GAMSO
Clerk

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1127

ALBERT VICTORY,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1127

ALBERT VICTORY,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

Albert Victory seeks a writ of certiorari to the New York Court of Appeals to review a judgment of that court entered October 23, 1971, which unanimously affirmed a judgment of the Appellate Division, First Department, recorded December 7, 1971, which unanimously affirmed, without opinion, a judgment of the Supreme Court, New York County, rendered May 26, 1970, convicting him after a jury trial of one count of the crime of felony murder [N.Y. Penal Law §125.25(3)] and sentencing him to a term of imprisonment of from 25 years to life.

Statement of the Case

John Varecha, a 25-year-old uniformed patrolman, was stationed at his post on a rainy Sunday night in Manhattan, five and one-half years ago, when he saw a car speeding through a red traffic light. Hailing a taxicab, he gave chase, unaware that his split-second decision to enforce the traffic law would cost him his life.

Pulling up behind the offending vehicle after it had stopped in front of a discotheque, the officer quickly approached the two occupants, the petitioner, Albert Victory, the operator, and Robert Bornholdt, as they were about to enter the nightclub, and tried to question them. Victory, "smirking" (LaGuardia, 897),* and dangling the car keys in his hand, denied driving the car, asserting that he and his companion had arrived by truck (F. Garcia, 1032, 1035; D. Garcia, 1331; LaGuardia, 842-3; Gentry, 1464-5).

Spurning further questioning, Victory and Bornholdt started to enter the nightclub. When the officer tried to bar their way, demanding satisfactory answers, Victory, enraged, grabbed the officer's raincoat, lifted him up by the lapels and threatened, "Don't you ever do that again" (F. Garcia, 1039, 1107; D. Garcia, 1334; LaGuardia, 843, 929-30; Gentry, 1468, 1470-1). They struggled, and as they moved down the block, witnesses who had just come out of the discotheque saw Victory kick the officer in the groin "very hard," as Bornholdt pounced on the patrolman's back (F. Garcia, 1042-6, 1122; D. Garcia, 1338-9, 1341, 1369-70, 1402; Gentry, 1472-3).

* Unless otherwise noted, numbers in parentheses refer to pages of the nine-volume printed record on appeal filed in the state courts. Numbers followed by the letter "A" are to the preliminary papers contained in the first volume of the record.

Defending himself with his nightstick, the injured policeman simultaneously drew his gun and, bent over in pain, told his assailants that they were under arrest (F. Garcia, 1049-50). Instead, Victory moved backwards toward an alley, repeating, "Come on. Give me a break," while Bornholdt kept angling behind the officer, preventing him from focusing his attention on both men at the same time (F. Garcia, 1050-1, 1134; D. Garcia, 1343; LaGuardia, 850-3, 855-6, 859, 969, 976). At some point, Victory raised his arms and edged over to a wall briefly, only to withdraw immediately from it and to continue to move into the alley (F. Garcia, 1052, 1241, 1248, 1315; D. Garcia, 1344, 1435; LaGuardia, 869-70).

Francisco Garcia, who had entered the alley to assist the officer, saw Victory and Bornholdt continuously edging around the injured officer (1243, 1246-8, 1315), and heard Victory say, "Get the cop" (1053, 1189-90, 1194-5), or "Get a cop. This guy is crazy" (1242, 1280-1). Garcia heard Victory order him to "Get the fuck out of here. Mind your own business" (1058, 1312); just then Garcia saw Bornholdt grab for something in his pocket (1058, 1249). As Garcia retreated, looking away from the officer and his prisoners, he heard two shots, and, turning, saw Victory and Bornholdt grappling with the officer (1059, 1164-5) as Bornholdt emptied his gun into the officer's body, mortally wounding him.

Bornholdt left the alley and ran, followed seconds later by Victory, who ignored police warnings to halt, ducked police bullets and kept running, only to be subdued by the police after a fierce struggle.

Section 125.25 of the current New York Penal Law, while limiting the number of crimes which may form the

predicate for felony murder, codified the prior doctrine of felony murder. Under this doctrine, a person is guilty of murder when:

> "3. Acting either alone or with one or more other persons, he commits or attempts to commit * * * escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants * * *."

Section 205.10 of the New York Penal Law provides that a person is guilty of the felony of escape in the second degree when, "Having been arrested for * * * a felony, he escapes from custody"; custody is defined as "restraint by a public servant pursuant to an authorized arrest * * *." N.Y. Penal Law §205.00(2). Assault in the second degree, a felony, is committed when: "With intent to prevent a peace officer from performing a lawful duty, * * * [a person] causes physical injury to such peace officer." N.Y. Penal Law §120.05(3). Physical injury "means impairment of physical condition or substantial pain." N.Y. Penal Law §10.00(9).

At the trial, the People's theory that Victory and Bornholdt had been arrested for assaulting Patrolman Varecha and had killed the police officer "in the course and in the furtherance of" the felony of escape in the second degree was established by the four eyewitnesses to the altercation, the testimony of the officer who arrested the fleeing duo, and the medical and ballistics evidence showing that Varecha was killed by bullets fired from Bornholdt's gun. Victory argued that he had not participated in the killing and had not escaped, while Bornholdt, admitting the killing

(see 2682-3), introduced psychiatric testimony which the People rebutted.

On April 17, 1970, the defendants were found guilty: Victory of felony murder and Bornholdt, the shooter, of felony murder and intentional murder. After a hearing to determine sentence [N.Y. Penal Law §125.30] the jury recommended life imprisonment.

On May 26, 1970, each defendant was sentenced to a term of imprisonment of from twenty-five years to life (3517, 3519-20).

On appeal to the Appellate Division, Victory argued that he was not proven guilty beyond a reasonable doubt, that the affirmative defense in New York Penal Law §125.25 is unconstitutional, that there were errors in the court's charge, and that the court demeaned defense counsel, improperly limited cross-examination, excluded relevant proof, and denied his right to counsel; he also argued that he was entitled to a severance and that there was an improperly "death qualified" jury.

On December 7, 1971, the Appellate Division, First Department, unanimously affirmed, without opinion, Albert Victory's conviction. *People* v. *Victory*, 38 A.D.2d 689 (1971) (S.R.5).*

In the New York Court of Appeals Victory repeated each of his earlier claims. On October 23, 1973 the Court of Appeals unanimously affirmed the convictions of both Victory and Bornholdt. The opinion by Judge JASEN, for the unanimous court, rejected Victory's claims. The opinion is reported as *People* v. *Bornholdt*, 33 N.Y.2d 75, 305 N.E.2d 461 (1973).

* References preceded by "S.R." are to the pages of the printed Supplemental Record on Appeal filed in the New York Court of Appeals.

Albert Victory invokes this Court's certiorari jurisdiction pursuant to 28 U.S.C. §1257. The time for doing so having expired, Robert Bornholdt has not sought review.

ARGUMENT

POINT I

The New York statutory definition of felony murder does not shift the burden of proof to the defendant as to material elements of the crime.

In New York a killing "in the course of, and in furtherance of" certain specified crimes, or in the course "of immediate flight therefrom," is a felony murder. There is, however, an "affirmative defense" that can be established by the defendant by the preponderance of the evidence [N.Y. Penal Law §25.00(2)]. That defense is:

> "(I)n any prosecution under this subdivision [the felony murder subdivision], in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:
>
> (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
>
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
>
> (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

> (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury." N.Y. Penal Law §125.25.

Petitioner seeks review of his conviction for felony murder by urging that the affirmative defense violates due process by changing the burden of proof on essential elements of the crime and violates his right against self-incrimination. The issue does not warrant review here. The state's statutory structure, taken as a whole, requires that all the elements of the crime must be proven by the People, beyond a reasonable doubt, but, if the defendant can prove that certain facts in mitigation exist, he is not to be convicted.

Under New York's long accepted common law doctrine of felony murder, a "heavy responsibility" is placed upon all who act together in the commission of a felony. *People* v. *Giro,* 197 N.Y. 152, 158 (1910).

> "Where a number of persons are acting together in the commission of the felony, a homicide perpetrated in furtherance of the felony is deemed to be within the common purpose and all are alike responsible in law therefor." *People* v. *Giusto,* 206 N.Y. 67, 73-74 (1912); *People* v. *Sobiskoda,* 235 N.Y. 411, 417 (1923); *People* v. *Usefof,* 227 N.Y. 622 (1919); *People* v. *Michalow,* 229 N.Y. 325 (1920); *People* v. *Corbo,* 284 App. Div. 273 (1st Dept. 1954), *aff'd,* 307 N.Y. 928 (1954); *People* v. *Wood,* 8 N.Y.2d 48 (1960).

Under this principle, a lookout has been held accountable for a homicide committed in furtherance of the felony [*People* v. *Usefof, supra*], as has been a robber who remained downstairs in a building while an accomplice committed a homicide upstairs. *People* v. *Giusto, supra.* A

co-conspirator who planned the felony was just as responsible as the actual killer for a killing that furthered the felony, even though he was not present during its commission. *People* v. *Michalow, supra*; *People* v. *Ryan,* 263 N.Y. 298 (1934). Indeed, if the homicidal act is in furtherance of the felony, the accomplice may be held responsible even though there was an express agreement not to kill, and even if he actually attempted to prevent the killing. *People* v. *Friedman,* 205 N.Y. 161 (1912); *People* v. *Wood, supra.*

By the same token, where a felon kills, not in furtherance of the felony, but in a "separate and distinct act and to satisfy his own end" [*People* v. *Wood, supra* at 52], or for a "personal reason" unrelated to the felony [*People* v. *Elling,* 289 N.Y. 419 (1943)], his accomplice is not accountable for the killing. Thus, contrary to petitioner's assertion (petition, p. 8), there has not been a New York requirement that "The People must prove the non-shooting defendant acted in concert with the shooting defendant in a felony murder prosecution." The New York test is whether the killing was related to the purpose of the underlying felony—in this case, escape.

As the New York Court of Appeals held in this case: "The harshness of the rule in particular cases was apparent, and hence, the instant provisions were incorporated in the revised Penal Law affording an accomplice of a felon who kills an opportunity to 'fight his way out' of a felony murder charge." (opinion, petition, App. at A-6.) Thus, the defense at issue here provides that certain facts, "none * * * [of which] constituted a defense to the crime of felony murder where the defendant had the requisite fe-

lonious involvement" (*ibid.*), could, if proven by the defense, exonerate him. Concluding that the felony murder rule "may be unduly harsh in particular instances," the Legislature enacted the affirmative defense "to allow a non-killer defendant of relatively minor culpability a chance of extricating himself from liability for murder." Denzer and McQuillan, *Practice Commentary to Penal Law* §125.25 (McKinney, ed.). The legislative decision is a rational one.

In *Morrison* v. *California,* 291 U.S. 82, 88-9 (1934), this Court, in upholding the validity of the burden placed on a defendant to prove his citizenship as a defense in a prosecution under the California Alien Land Law, held:

> "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunity for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

The defense at issue here falls within *Morrison.* The statutory defense applies only to a non-shooting defendant who can establish lack of complicity in the killing and lack of knowledge of the existence of the weapon and of its possible use. Thus, like the burden of proof of the defense of insanity, which despite petitioner's citation to *Davis* v. *United States,* 160 U.S. 469 (1895) (petition, p. 9), this Court has held, may be placed on a defendant [*Leland* v. *Oregon,* 343 U.S. 790, 800 (1952)], the burden of proof

of the defense of lack of knowledge here may be placed upon one who would be guilty of murder in the absence of that defense. Indeed, there is no question that constitutionally the New York Legislature could have retained the strict felony murder rule without at all providing for the defense.

Moreover, under this statute, no defendant is forced to take the stand to raise this defense; Victory, in particular, did not have to do so and, in fact, chose not to. As Victory's trial counsel observed, "the affirmative defenses can be elicited either from the prosecution's witnesses or from direct or cross-examination of any witnesses * * *. It is not limited to testimony of a defendant" (2676, 3137). And, to be sure, Victory's trial counsel in fact argued the affirmative defense strenuously and extensively in his summation without calling the defendant as a witness. *See People* v. *Moro,* 23 N.Y.2d 496 (1969).

POINT II

There was an adequate state ground for denying the motion for a severance; in any event, the state courts applied the proper federal standards.

Petitioner alleges that he was denied due process because the trial court refused to sever his case from his co-defendant's. The state courts have held that the motion was untimely, thereby applying an adequate state law basis for the denial of the motion.

The two defendants were jointly indicted in October 1968 for the felony murder of Patrolman Varecha. By

motion returnable September 4, 1969, the People moved to consolidate the felony murder indictment with the separate intentional murder indictment against Bornholdt (55A-60A). In an untimely affirmation (see 8A) dated January 21, 1970, Victory opposed consolidation and requested a severance of his case from Bornholdt's. He alleged that Bornholdt's insanity defense which implicitly admitted his own guilt, "would make it impossible for the jury in a joint trial to render a fair and impartial verdict on behalf of the defendant Victory" (62A); that Bornholdt's incompetence to stand trial prejudiced Victory's defense; and that the questions raised by the intentional murder count could not be separated in the jury's mind from the issues on the felony murder count (*ibid.*). The motion to consolidate was granted February 10, 1970 (see 8A).

In a motion returnable March 2, 1970, the date when the case was moved for trial and the selection of the jury commenced, Albert Victory again requested a severance of his case from that of his co-defendant Robert Bornholdt, this time on the ground that he intended to call his co-defendant as a witness for the defense in order to introduce through him a statement which Bornholdt had allegedly made and which purportedly "exculpated" Victory (126A-129A).

In an affidavit in support of this motion, Michael C. Pollina, Esq., counsel for Victory, averred that he had been advised by Bornholdt's attorney that if Bornholdt were called as a witness, he would assert his privilege against self-incrimination; that Victory "needed" Bornholdt's testimony, and without it could not "properly present a defense"; and that under *People* v. *Owens,* 22 N.Y.2d 93

(1968), he would be barred in a joint trial from calling Bornholdt as his witness, or commenting on his failure to testify, and that the only way he could properly do so would be in a separate trial.*

Bornholdt's unsigned "statement" was not then shown to have actually been made by Bornholdt; Victory's counsel, Michael Pollina, Esq., later stated that the original signed statement was in the possession of an attorney for Bornholdt who had dictated the contents to Mr. Pollina's secretary (VD 165-6, 25-7).** In any event, the "statement" was attached to Victory's moving papers (Victory's Exh. A; 130A):

> "Albert Victory had nothing to do with the shooting of the police officer on October 7, 1968 outside the club Arthur. I alone did the shooting because the police officer had clubed [*sic*] me on the head and had pointed and fired his gun at me and Albert. Both Albert and I would have been killed by this police officer who had gone crazy and had clubed me and Albert and he was going to shoot us."

Counsel for Victory argued this motion on March 3, 1970, after both sides had started to select the jury. Mr. Pollina indicated that he had obtained Bornholdt's state-

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* Later, Victory again moved for a severance, this time on a different theory, alleging that his co-defendant would be unable to participate in the defense due to having been administered certain drugs for his psychiatric condition (137A-139A). This motion was also denied (136A).

** The argument on the motion was transcribed at pages 22-57 of volume 4 of the printed record. When the minutes of the *voir dire* of the jury were transcribed pursuant to the Appellate Division's order (4A), the argument was retranscribed. References preceded by VD are to pages of the *voir dire* minutes, which appear in volumes 1-4 of the printed record. For the Court's convenience the references to this argument will be to both sets of minutes.

ment through an attorney, "Mr. Kramer," who had previously represented Bornholdt, and who, at Mr. Pollina's request, had dictated the statement to Mr. Pollina's secretary (VD 165-7; 25-7).

Pollina indicated that he had known about the statement for "several months" (VD 182; 43). But he claimed that he had not requested a severance earlier because, he alleged, due to Bornhold's psychiatric condition it was not known until March 2 whether Bornholdt would in fact go to trial or be declared incompetent. [Bornholdt had actually been committed for psychiatric examination on January 27, 1970 (see 8A), one week after Victory had made his first severance request.] Further Pollina stated, "I have no obligation to indicate to the People the manner in which I intend to submit my defense" and, "in effect, assist the prosecution in preparing their case" (VD 182; 43-4).

Neither in his motion papers nor on oral argument did Pollina make any showing whatsoever as to what Bornholdt's testimony would be, that it would have any exculpatory effect on Victory, or that Bornholdt would in fact testify were he called as a witness in a separate trial.

In response to the court's inquiry, Bornholdt's attorney, Seymour Brown, Esq., stated that if his client were called to the stand by Victory, "he will decline to testify, based upon the Fifth Amendment" (VD 174-5; 35). Nevertheless, Pollina argued, he had the "right to call Mr. Bornholdt as a witness despite the fact that he has been instructed by his attorney to assert his privilege, and that the defendant Victory has an absolute right to comment on that failure to the jury" (VD 175; 35-6).

In its decision of March 3, the court denied the motion for a severance (124A-125A). The court ruled that despite "the information relating to the statement Bornholdt allegedly gave to an attorney (being) in possession of Victory's attorney for many months * * * he failed to make a timely motion for a severance of Victory's trial until the eve of trial. The unexplained long delay in moving for a severance would, under *People* v. *Owens*, 22 N.Y. 2d 93 (1968) justify the court in denying the motion for a severance on that ground alone." The court found that the alleged statement of Bornholdt which purportedly exonerated Victory was "purely a conclusory statement which Bornholdt would be prohibited from making even if he were called and testified." And since, the court observed, the law prohibits the calling of a witness who the attorney knows, in advance, will claim his privilege, solely for the purpose of permitting the attorney to comment on the failure of the witness to give testimony, the court "admonished" counsel for Victory "that under no circumstances shall he attempt to call Bornholdt as a witness on his case."

Three weeks later, Victory unsuccessfully renewed his motion for a severance (141A-145A), reiterating substantially the same arguments he made previously, noting that "the decision not to move for a severance [earlier] was a strategic one." Again during the trial Victory repeated his request for a severance (1952), and his request to call Bornholdt as his witness or to comment on his failure to testify (1955, 2547), and also requested the right to call the attorney Kramer as his witness in order to introduce Bornholdt's statement into evidence (2540-4). The court denied these requests.

Under the established New York rule a motion for a severance must be timely. As then Judge BREITEL stated for the court in *People* v. *Owens, supra* at 98:

> "[I]f a defendant knows or should have known in advance of trial of his intention to call a codefendant as a witness or that of a codefendant to call him as a witness the application for appropriate relief must be made in advance of trial, indeed, as early as it is reasonably feasible."

Thus, at the outset it is clear that the trial court correctly exercised its discretion to find that the application was untimely. Victory's motion was not, as he now states, made "three weeks before trial" (petition, p. 15, n. 12), but was returnable the day that the *voir dire* began. Victory tries vainly to offer an explanation for his waiting "several months" to make the motion (petition, p. 15, n. 12). It is insufficient. Victory's claim that he never knew whether Bornholdt would actually go to trial or be found incompetent is self-serving, irrelevant and speculative. It is also misleading. Bornholdt had just been ordered to undergo a new psychiatric examination on January 27, 1970 (8A), only one week after Victory had first requested a severance on grounds unrelated to Bornholdt's testimony (61A-63A). He should have brought his motion when he first learned of the information months earlier. *People* v. *Owens, supra* at 98. Victory's stated reasons for not making his motion earlier is more revealing: he did not wish to divulge his case to the prosecution. On that score alone, the trial court had an ample basis for the exercise of its discretion and correctly denied the motion. So too did the Court of Appeals, which held: "finally, the motion was untimely in that it was not made until the eve of trial al-

though the facts on which it was based were known to defense counsel months earlier" (opinion, petition, App. at A-11). The Constitution surely does not preclude reliance on a reasonable rule requiring that a severance motion be timely.

As the opinion below indicates, the New York courts gave proper weight to the prevealing principles on the merits of the application and found that the application was factually deficient (see opinion, petition, App. at A-10; A-11).

Several relevant factual matters also deserve mention. Bornholdt's statement standing alone—if in fact he ever made it—is at least a neutral document as far as Victory is concerned, and, much more likely, a damning indictment of both him and his accomplice. It has absolutely no exculpatory effect on Victory's role in the felony murder. For, the prosecution's theory at trial was that Victory and Bornholdt escaped, during which Bornholdt killed the officer. As far as Victory mattered, all the prosecution needed to prove was that Victory escaped and that in furtherance of the escape Bornholdt shot and killed the officer. The prosecution was not required to prove, albeit it did offer proof in this regard, that Victory had any role at all in the shooting.

Thus, rather than exonerating Victory, Bornholdt's statement served to corroborate some of the salient facts proved by the prosecution regarding the felony murder. For example, it supported the People's testimony that there was a violent confrontation with the police officer, that the officer was impelled at one point to use his nightstick upon the defendants, and compelled to draw his gun. It is

reasonable to infer from such a statement, in line with the prosecution's theory, that certain conduct by the defendants, that is, an attempt to escape, served as a predicate for the officer's desperate acts.

And, despite Victory's suggestion (petition, p. 16, n. 14), the statement allegedly made by Bornholdt would not be admissible as a declaration against his penal interest at a separate trial of Victory alone. *Cf. People* v. *Brown*, 26 NY2d 88 (1970). First, under the circumstances presented in the record it was not clearly established that the statement was, in fact, made by Bornholdt. Secondly, the statement, in its entirety, is not against Bornholdt's penal interest, since in it he asserted that he shot the police officer but maintained that it was in self-defense. A statement which contains within its four corners a defense—"both Albert and I would have been killed by this police officer who had gone crazy and had clubed [*sic*] me and Albert and he was going to shoot us" (130A)—is not against the maker's interest and thus is not admissible under the exceptions to the hearsay rule.

Petitioner relies upon *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), for the proposition that any state evidentiary rule that excludes exculpatory evidence automatically violates due process (see petition, p. 16). However, it appears that the Court was merely placing a due process proscription on the use of over-technical state rules. "The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the States." *Id.* at 297-8. The Court also rejected the argument that using

the guise of the hearsay rule to limit the right to introduce exculpatory evidence may violate due process. However, the Court surely did not prevent the use of reasonable, rational rules to determine the propriety of a joint trial. Victory offered nothing of probative value to require a severance and, therefore, the state courts' sound exercise of discretion is not invalidated by *Chambers*.

POINT III

The rights of confrontation and due process are not violated by a rule which defines the type of prior inconsistencies which may be used to impeach a witness at trial.

During the cross-examination of one of the People's main witnesses at trial, the defendant tried to impeach him by using an allegedly inconsistent prior statement. The alleged inconsistency was that in two of the three statements which the witness gave to the police and prosecutors on the night of the crime, his description of the events did not include a statement that Victory had kneed Patrolman Varecha in the groin. In the third statement, the kneeing was mentioned. Petitioner urges this Court to review the Court of Appeals' ruling because, he alleges, it denied him the right of confrontation.

There is, however, no federal constitutional question raised by a state's reasonable evidentiary ruling that before a witness may be impeached by an omission in a prior statement, the cross-examiner must show that on the prior occasion the "witness's attention was called to the matter and that he was specifically asked about the facts embraced

in the question propounded at trial'' (opinion, petition, App. at A-12).

Mere questions of the scope of state evidentiary rules do not rise to the level of constitutional claims. A constitutional claim would appear to exist where an archaic, irrational rule that ''bears little present relationship to the realities of the criminal process'' is applied to effectively preclude a defendant from adducing the truth at trial. *Chambers* v. *Mississippi*, 410 U.S. 284, 296 (1973). That is not the case here.

The holding below is no more than an evidentiary rule, reasonably regulating the scope of cross-examination of an adversary's witness. The Court of Appeals concluded that its rule was a reasonable one since it ''accords with human experience recognizing that unless asked directly about a matter a person may quite normally omit it from a narrative description'' (opinion, petition, App. at A-12). And, as the court below noted, nearly every state court which has considered the question has concluded that a rule similar to the New York rule is proper.

POINT IV

The trial jury was properly selected.

Petitioner also argues that review is warranted since there was a ''death qualified'' trial jury.

For over three weeks several hundred prospective panelists were examined by the court, the prosecution and the defense with a view to selecting a fair-minded jury

capable of rendering impartial judgments on the issue of guilt and, since this was a capital case (N.Y. Penal Law §125.30), punishment. Such a jury was selected, as evidenced by its care and deliberateness in reaching its verdict, and by its mercy in recommending life imprisonment.

Victory attacks the selection process, claiming that it resulted in a "death-qualified jury," and intimating that such a jury was "prosecution-oriented" and "ready to convict the defendant" (petition, pp. 17-18). He cites *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968) and its progeny to support his claim.

Petitioner is precluded from raising the issue, since the jury recommended life imprisonment, not death. *Bumper* v. *North Carolina,* 391 U.S. 543, 545 (1968).

And, since Victory raises the point (petition, pp. 17-18), it should be noted that both *Witherspoon* and *Bumper* considered and unequivocally rejected the proposition that a jury composed only of jurors entertaining no scruples against voting the death penalty—hardly the case here—was prosecution-oriented and ready to convict the defendant. *Witherspoon* v. *Illinois, supra* at 516-518; *Bumper* v. *North Carolina, supra* at 545.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March, 1974

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In The

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October Term, 1973

No. 73-1127

ALBERT VICTORY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1127

ALBERT VICTORY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

Reply to People's Point I [1]

Seeking santuary in the practice commentary to McKinney's New York Penal Law, the District Attorney contends that the affirmative defense provision of the New York felony murder statute gives a defendant a chance to "fight his way out of a felony murder charge."[2] Inherent in that statement is the concept that the affirmative defense shifts to the defendant an intolerable burden constitutionally unacceptable in a criminal prosecution.

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[1] This issue is covered in Point I of our petition at 7-11.

[2] Respondent's Brief at 8.

Notably, the People have completely failed to rebut our claim that the affirmative defense was unconstitutionally applied in this case.[3] When the Court examines:

(1) both statements of the defendant Bornholdt which exculpate petitioner;

(2) the repeated denial of petitioner's motions for a separate trial;

(3) the trial court's admonition to petitioner's lawyer not to call Bornholdt as a witness or comment on his refusal to testify; and

(4) the total lack of evidence from any source other than Bornholdt by which petitioner could sustain the burden of proof assigned to him by the statute,

it will find irresistible the conclusion that the affirmative defense provisions were unconstitutionally applied to petitioner's case. For the state, while requiring petitioner to demonstrate his lack of knowledge that Bornholdt was armed and intended to shoot the deceased police officer, simultaneously denied him a separate trial or an opportunity to produce the very testimony which would have sustained the burden of proof imposed upon him.

The People's inability to explain these constitutional defects should help to persuade this Court that its review is necessary here. For clearly the state has exceeded the "limits of reason and fairness" in shifting this burden to petitioner. *Morrison* v. *California*, 291 U.S. 82, 88 (1934). For all these reasons, as well as those advanced in our petition, the Court should grant certiorari.

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[3] See Petition for Certiorari at 10-11.

Reply to People's Point III[4]

Overlooking this Court's clear instruction in *Jencks* v. *United States*, 353 U.S. 657 (1957),[5] the People argue that a state evidentiary rule may constitutionally limit the confrontation clause of the sixth amendment. This Court has, however, repeatedly and properly upheld the superiority of the constitutional right to confront one's accusers, unbound by restrictive state evidentiary rules. *Davis* v. *Alaska*, U.S. , 14 Cr.L. 3117 (February 27, 1974); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Tha-Soo-yel-lee* v. *United States*, 167 U.S. 274 (1897).

Only three weeks ago this Court struck down a state evidentiary rule which prohibited the defense from inquiring into the criminal record of a juvenile, where his testimony was critical to the conviction. The facts in our case are equally compelling, for here Garcia was the principal witness who, if properly discredited as to his testimony regarding the most important fact raging in petitioner's case, would have dragged the People's case down with him. In *Davis* this Court reaffirmed the importance of an unfettered defense right to cross-examine the state's witnesses:

> "Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' *perceptions* and *memory*, but the cross-examiner has

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[4]This issue is covered in Point II of our petition at 12-14.

[5]The New York Court of Appeals adopted the *Jencks* rule in *People* v. *Rosario*, 9 N.Y. 2d 286, 213 N.Y.S. 2d 448 (1961).

> traditionally been allowed to impeach, *i.e.*, discredit the witness." (14 Cr.L. at 3120; emphasis added.)[6]

Of special relevance here is the Court's awareness in *Davis* that:

> "We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.' *Douglas* v. *Alabama*, *supra*, 380 U.S., at 419. The accuracy and truthfulness of Green's testimony was a key element in the State's case against petitioner." (14 Cr.L. at 3120)

And in *Davis* this Court did not hesitate to reverse the state's high court determination that the cross-examination permitted was adequate to show the witness' bias and prejudice. Where defense counsel, as in our case, was cut short in the middle of his effort to show the jury why the witness should not be believed, this Court observed:

> "On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness. . . . ." (14 Cr.L. at 3120)

In *Davis* the Court confirmed the right of the defense to expose facts from which the jury, as exclusive trier of the facts, could infer the witness' unreliability. Our case is identical to the *Davis* situation, and the holding in that case applies here with equal effect:

> "Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the

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[6]The People, even at trial, have never claimed that defense counsel's attempt to discredit Garcia through the use of his prior inconsistent statements was in any way repetitive or unduly harassing cross-examination.

> first magnitude and no amount of showing of want of prejudice would cure it.' . . ." (14 Cr.L. at 3120-3121)

As they did in the Court of Appeals, the People have again introduced an argument not made in the lower court, suggesting here for the first time that there were "three" statements made by Garcia. The third "statement" was not a statement at all, but rather notes made by an Assistant District Attorney prior to his stenographically recorded question and answer statement taken from Garcia.[7] The notes were never adopted by Garcia in any way and never signed by him. Since it is undisputed that Garcia never mentioned the kneeing incident in either of his *statements*, the reference to a kneeing incident must have been added to the notes at a later date.[8]

Actually, Garcia never mentioned the kneeing incident in his statements. And that omission is one which should have been clearly before the jury as they assessed the accuracy and credibility of his testimony. Moreover, the record demonstrates that Garcia thought his attention was directed toward the alleged kneeing incident when he gave his statements. Thus, the rule adopted by the Court of Appeals bears no relationship to the primary question, namely whether the jury should be permitted to ascertain the witness' credibility and reliability on the basis of the omissions *whether or not his attention was directed to the particular fact subsequently related at trial.*[9] It is for the jury to determine, based upon all of the witness'

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[7]These notes, although available at trial, were never turned over to the defense pursuant to the *Rosario-Jencks* rule.

[8]We are reluctant to attribute to a prosecutorial office held in such high esteem an error so grave that the Assistant District Attorney would have omitted from a comprehensive question and answer type statement all reference to the alleged act that would have been critical to the homicide.

[9]We do not suggest that the People should not disclose to the jury, if they can, that the witness' attention was not directed to the alleged fact. Here, of course, Garcia told the jury he thought his attention had been directed toward the alleged kneeing incident.

testimony, whether the glaring omission comported with credibility, reliability and accuracy.

The rule adopted by the Court of Appeals, based as it is upon terribly weak reasoning and authority, directly violates petitioner's sixth amendment right to confront the chief prosecution witness. For all these reasons, as well as those advanced in our petition, the Court should grant certiorari.

Reply to People's Point II[10]

Conceding, as he must, that the defendant Bornholdt would not testify in a joint trial with petitioner, the District Attorney fashions a blind to divert the Court's attention by suggesting the "state ground" of untimeliness required the denial of a separate trial. However, no amount of prosecutorial rhetoric can obscure the fact that until Bornholdt was certified as capable of standing trial, petitioner was well within his rights in declining to disclose the nature of his defense.[11] Thus, the timeliness of petitioner's motion must be measured not from the moment he obtained evidence useful to his defense, but rather from that point in time where a joint trial was imposed upon him.

The most salient weakness in the People's argument is the total absence of any prejudice occasioned by a separate trial. Nowhere do the People suggest that they would be unable to try the defendant separately or that it would be inconvenient to do so.

The prosecution, as they did below, instead attempts to blink away Bornholdt's statement at sentencing[12] and contends that

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[10]This issue is covered in Point III of our petition at 14-17.

[11]We are constrained to remind the Court that petitioner's counsel moved for a separate trial on the ground that he had to call Bornholdt as a witness only when it was clear Bornholdt was going to be tried jointly with petitioner.

[12]At sentencing Bornholdt said:

> "I would like to say Albert Victory never knew I had the gun with me and I was insane at the time." (3511)

Bornholdt's written statement did not assist petitioner. The written statement could not be less neutral, for the first sentence states:

> "Albert Victory had nothing to do with the shooting of the police officer on October 7, 1968 outside the club Arthur." (130A)

Suggesting that the statement contains a defense and is, therefore, not a statement against Bornholdt's penal interests, the People commit a two-fold error. First, the jury should have been permitted, in a separate trial, to determine the significance of Bornholdt's full statement. Secondly, the evidence showed that Bornholdt had "pounced" on the police officer before the officer clubbed him with his nightstick, and that Bornholdt drew his gun on the officer before the latter shot at Bornholdt. Thus, in context the statement clearly contains no defense and is obviously against Bornholdt's penal interest.[13] In the final analysis, the jury should have been permitted to determine, in a separate trial, the significance of Bornholdt's statements.

This felony murder conviction, achieved in a way one would have thought impossible in our generation, should cause this Court intense concern. Petitioner's rights were trampled beyond recognition when he was locked into a joint murder trial with a man he hardly knew, but who could have exonerated him in a separate trial.

The existence of two statements demonstrating petitioner's innocence, combined with the trial court's refusal to permit proper cross-examination of the state's key witness, effected a gross denial of confrontation and due process of law the likes of which should not be permitted anywhere in our judicial system.

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[13]The People's vagarant suggestion that Bornholdt's statement confirms their theory digs deep but comes up empty. They can search that statement from now until doomsday and they will never find in it any mention of an intent to escape.

Compounding the egregious constitutional errors committed in this trial was the requirement that petitioner prove his lack of knowledge that Bornholdt was armed and would shoot the police officer. The refusal to permit petitioner to call Bornholdt as a witness, or provide a separate trial, preordained petitioner's inability to meet the unconstitutional burdens of the affirmative defense provisions of the New York Penal Law.

For all these reasons, as well as those advanced in our petition, the Court should grant certiorari.

Respectfully submitted,

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